In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2062

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

This case has been the subject of four prior decisions:

(a) The opinion of the Indian Claims Commission, entered on November 4, 1965 (Pet. App. D), reported at 16 Ind. Cl. Comm. 341;

(b) The opinion of the Court of Claims, entered on February 16, 1968 (Pet. App. C), reported at 182 C.Cls. 543 and 390 F. 2d 686;

(c) The opinion of the Indian Claims Commission, entered on August 2, 1972 (Pet. App. B), reported at 28 Ind. Cl. Comm. 264;

(d) The memorandum order of the Court of Claims (Pet. App. A) on which the writ is sought, which is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 29, 1974. The court's order denying petitioners' motion for rehearing was entered on May 31, 1974 (Pet. App. A, p. 6a). The petition for a writ of certiorari was filed on July 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

A 1910 Act of Congress authorized the sale of certain surplus Indian lands in North Dakota under the homestead laws at prices to be established by a commission appointed pursuant to the Act, the proceeds therefrom to be credited to the account of the Indians and to earn interest at three percent per annum. The prices so established were found by the Indian Claims Commission to be substantially below the fair market value of the lands.

The question presented is whether the government's sale of the homestead lands constituted a taking of the Indians' property for which just compensation was due, so that the interest rate on the difference between the sale price and market value should be five percent, or only a breach of the government's fiduciary duty to protect Indian property, in which event the interest rate on the same principal amount would be the three percent rate established by the 1910 Act.

STATUTE INVOLVED

The Act of June 1, 1910, 36 Stat. 455, is reproduced at Pet. App. E.

STATEMENT

The Three Affiliated Tribes of the Fort Berthold Reservation brought this action seeking, among other

things, to recover just compensation for certain tribal reservation lands in North Dakota allegedly taken by the United States.

In the Act of June 1, 1910, Congress, expressly stating that it was acting in a trustee capacity, undertook to allot certain lands on the Fort Berthold Reservation to members of the Three Affiliated Tribes of the Fort Berthold Reservation and to dispose of certain surplus unallotted lands. With regard to disposition of these surplus lands, the Act provided, *inter alia*, for sale under the homestead, mineral, and townsite laws at appraised prices to be determined by a three-man commission made up of one member of the Tribes, one representative of the Interior Department, and one resident of North Dakota. The Act provided that the net proceeds of the sale of lands under the Act shall be held to the credit of the Indians and shall draw interest at three percent per annum.

In 1951, petitioners filed the instant claim with the Indian Claims Commission pursuant to the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70 *et. seq.* In 1965, the Commission determined that, while the petitioners had a compensable interest in the lands disposed of pursuant to the 1910 Act, no Fifth Amendment taking had occurred (Pet. App. D). On an interlocutory appeal, the Court of Claims reversed in part (Pet. App. C). The court stated that no Fifth Amendment taking occurs if Congress, in transmuting tribal assets from land into money, makes a good faith effort to give the Indians the full value of their lands (Pet. App. C, p. 8c). Applying this test, the court held that

the lands sold for homesteads were not taken because Congress, by directing that the homestead lands be classified and sold at their appraised value, had made a good-faith effort to obtain full value of the lands for the Indians. Accordingly, the court held, petitioners could recover under the Indian Claims Commission Act only upon a showing that the homestead lands were sold for an amount so far below their fair market value as to result in a fraud, gross negligence or a breach of the government's fiduciary obligations to the Indians. The Court of Claims remanded the case to the Commission for determination of remaining issues, and review in this Court was not sought.

On remand, the Commission found, *inter alia*, that the homestead lands had been appraised and sold at such an undervalued price as to result in a breach of fiduciary duty. A total of $7,605,086 was awarded as damages for this alleged breach of fiduciary duty, representing the full principal amount of $2,765,067 plus interest at the three percent rate established by the 1910 Act, totaling $4,840,019 as of June 30, 1972 (Pet. App. B, pp. 22b, 35b). The Commission rejected, as contrary to the law of the case, petitioners' renewed claim that the sale of the homestead lands constituted a Fifth Amendment taking as to which interest should be calculated at the rate of five percent (*id.* at 18b–19b), which the Commission held in another connection to be applicable to such takings (*id.* at 22b–34b).

Petitioners appealed the Commission's decision and again contended that the 1910 Act constituted a Fifth

Amendment taking of the homestead lands. The government, on the other hand, argued that under the doctrine of the law of the case, the court should refrain from reopening issues decided in 1968. On March 29, 1974, the Court of Claims affirmed, saying that the decision of the Commission is "correct" (Pet. App. A, p. 2a). The court subsequently denied petitioners' motion for a rehearing and suggestion that the rehearing be *en banc* (Pet. App. A, p. 6a).

ARGUMENT

The petition presents only a narrow issue involving the proper characterization of a statute of limited scope, the only practical effect of which is on the interest rate applicable to the Commission's award.

1. The United States, in its role as trustee on behalf of the Indians, may have occasion to transmute trust lands into other forms of trust property. The government may also act in its sovereign capacity and take Indian lands for a public purpose, but when it does so it is obliged under the Fifth Amendment to render just compensation. The court below stated the legal standard for distinguishing between the two situations as follows (Pet. App. C, p. 8c):

> Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.

This formulation is in harmony with the relevant decisions of this Court. *United States* v. *Klamath and*

Modoc Tribes, 304 U.S. 119, 123; *Chippewa Indians* v. *United States*, 301 U.S. 358, 375–376; *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497; *United States* v. *Creek Nation*, 295 U.S. 103, 109–110. Petitioners' arguments are primarily directed, not against the standard itself, but rather against the manner in which the court below applied the standard to the homestead lands issue.

2. The court below properly determined that the homestead lands were not taken by the United States. Congress itself expressly stated that it was acting in its trustee capacity in this matter (Pet. App. E, p. 8e). By providing for classification and appraisal by a three-man commission, Congress made a practical effort to see that the Tribes obtained full value of their surplus lands. Accordingly, the Commission and the court properly declined to speculate as to Congress' alleged "true" motives in enacting the 1910 statute.

In any event, the question whether the Commission properly applied the governing legal standard to the facts in this case does not warrant further review.

3. There is no merit in petitioners' claim that they were improperly denied an opportunity to be heard on the question whether the homestead sale provisions of the 1910 Act constituted a Fifth Amendment taking, disposed of by the Court of Claims in its 1968 decision. At issue was the legal characterization to be

given to a particular Act of Congress. The statute itself (including the explicit assertion that Congress was acting "as trustee" for the Indians (Pet. App. E, p. 8e)), and the usual sources of legislative history available to the court, provided a sufficient basis for making the determination whether the 1910 Act was a good faith effort by Congress to care for the property of the Indians, rather than to take it. The additional extrinsic evidence proffered by petitioners concerning the true "motives" of sponsors of the 1910 Act was unnecessary and is normally irrelevant in such assessments of legislation. Cf., *e.g.*, *Fletcher* v. *Peck*, 6 Cranch 87, 130; *United States* v. *O'Brien*, 391 U.S. 367, 383–384; *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 462. Accordingly, petitioners cannot properly complain.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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